

INSTITUTIONAL ASPECTS OF THE CONSTITUTIONAL TREATY – WHICH WAY DOES IT GO?¹

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Background

Following the presentation of the draft Constitutional Treaty by the convention chaired by Giscard d'Estaing, in September 2003 the United Kingdom government published a White Paper² on the British Approach to the Intergovernmental Conference. The overall approach of the UK government to the draft Treaty was clearly summarised by the Foreign Secretary, Jack Straw, when he introduced the White Paper to the House of Commons on 9 September 2003. He there stated that "the proposals in the current draft Treaty do not change the fundamental relationship between the EU and its Member States; and on any analysis it involves less change than that in Maastricht and the Single European Act". With the benefit of hindsight, it is interesting to observe that on that basis he suggested that there was no need for a referendum, and that the outcome of the IGC should be decided upon by Parliament. Whatever the vagaries of domestic politics which have led to the 2004 Treaty establishing a Constitution for Europe which resulted from the Intergovernmental Conference being subject to a referendum in the UK, that Treaty does in fact effect a number of

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² Cm5934

institutional changes which taken together may be regarded as of some importance.

Under the Amsterdam and Nice Treaties institutional reform was very much driven by the prospect of enlargement, and arguably inappropriate linkages were made between e.g. voting rights in the Council of Ministers and the number of members of the Commission. However, one of the most noticeable features of the Constitutional Treaty is that it alters the delicate balance achieved at Nice in relation to the direct and indirect representation of Member States and their citizens in the EU institutions. Opposition to this by Spain and Poland delayed adoption of the Constitutional Treaty by Member States, but it may be suggested that in some ways the Constitutional Treaty will strengthen the position of the smaller Member States, and also increase the role of national parliaments. This paper will examine the direct representation of Member States in the European Council and the Council of Ministers, what might be termed their indirect representation in the Commission (and, by way of contrast, the European Central Bank), and the direct representation of their citizens in the European Parliament and through national parliaments.

Direct Representation of Member States

- **European Council and Council of Ministers**

No commentary on the Constitutional Treaty can avoid noting that it would provide for the European Council to have a President elected by his or her colleagues for a term of two-and-a-half years renewable once (art.I-22), and that the European Council would include the EU Minister for Foreign Affairs (art.I-21(2)), who would also be a vice-President of the Commission (art.I-26(5)). Its decisions in principle are to be taken by consensus (art.I-21(4)), so that in principle the views of Malta or Luxembourg count for as much as those of Germany, but a number of articles of the Treaty provide specifically for the European Council to act by qualified majority, and the same rules for qualified majorities apply as in the Council of Ministers (art.I-25(3)), and it is in the context of the Council of Ministers that some subtle changes have been made.

Under art.I-23(3) the Council continues to comprise a representative of each Member State at ministerial level. The Constitutional Treaty would at last give express recognition to the different “formations” of the Council. The Treaty text envisages:

- o General Affairs Council (art. I-24(2))
- o Foreign Affairs Council chaired by EU Minister for Foreign Affairs (art.I-28(3))
- o Other configurations determined by the European Council (art.I-24(4))

Except for the foreign Affairs Council, the Presidency of these configurations would be held on rotation, as determined by the European Council (art.I-24(7)). The draft decision on this annexed to the Treaty envisages that the Presidency of the Council, with the

exception of the Foreign Affairs configuration, is to be held by pre-established groups of three Member States for a period of 18 months. The groups are to be made up on a basis of equal rotation among the Member States, "taking into account their diversity and geographical balance within the Union." It is further envisaged that each member of the group should in turn chair for a six-month period all configurations of the Council, with the exception of the Foreign Affairs configuration, and that the other members of the group should assist the Chair in all its responsibilities on the basis of a common programme, although members of the team may decide alternative arrangements among themselves. This obviously represents a formalisation of the traditional "troika" between current, past, and future holders of the Presidency.

Similarly, it is envisaged that the Committee of Permanent Representatives of the Governments of the Member States is to be chaired by a representative of the Member State chairing the General Affairs Council, but that the Political and Security Committee should be chaired by a representative of the Union Minister for Foreign Affairs. Furthermore, the chair of the preparatory bodies of the various Council configurations, with the exception of the Foreign Affairs configuration, is to fall to the member of the group chairing the relevant configuration, unless decided otherwise. It is also made clear in the draft decision that it is to be the role of the General Affairs Council to ensure consistency and continuity in the work of the different Council

configurations in the framework of multiannual programmes in cooperation with the Commission.

However, a fundamental change is made in the decision-making process by providing that the Council should normally act by a qualified majority (art.I-23(3)). Historically, 1the basic rule laid down by what is currently art.205(1) of the EC Treaty has always been that "save as otherwise provided in this Treaty, the Council shall act by a majority of its members". There were however relatively few provisions in the Treaty which did not provide otherwise, thus allowing the Council to act by a simple majority, and their number had been reduced further by the Single European Act and subsequent Treaties. Critics of the Single European Act would in fact count it as a retrograde step that whereas the original art.49 of the EEC Treaty, dealing with legislation on the free movement for workers, allowed the Council to act by a simple majority, albeit without being expressly required to consult the European Parliament, the version introduced by art.6(3) of the Single European Act required the Council to act by a qualified majority, even if it was in co-operation with the European Parliament (and further amendment by the Maastricht Treaty introduced the codecision procedure to this provision).

On the other hand, simple majority voting remained possible in the area of vocational training under art.128 of the original version of

the EEC Treaty, a provision held to be wide enough to cover the second phase of the programme on cooperation between universities and industry regarding training in the field of technology (COMETT II) in Cases C-51, 90 and 94/89 *United Kingdom, France and Germany v. Council*³, until its replacement by the more specific provisions on education introduced by the Maastricht Treaty. It may however be observed that the current art.149 on education allows the Council to act in codecision with the Parliament, as does art.150 on vocational training.

This procedure, introduced by the Maastricht Treaty, and simplified by the Treaty of Amsterdam, has largely replaced the cooperation procedure created by the Single European Act. These procedures have led to a greatly increased use of qualified majority voting, since both procedures involve the use of that system in the Council. The original version of the EC Treaty did, of course, contain a number of provisions allowing for a qualified majority to be used, but the opportunity was very rarely taken to make use of it. This, to a large extent, is usually attributed to the influence of the so-called Luxembourg Accords of 1966. In anticipation of the introduction of qualified majority voting in the Council of Ministers with regard to agricultural legislation under the original art. 43(2) and (3) of the EEC Treaty, at the end of the second stage of the original transitional period (i.e. 1 January 1966), the French government

³ [1991] ECR I-2757

pursued its "empty chair" policy in the second half of 1965, refusing to send a Minister to attend Council meetings. The Accords, which in reality appeared to be no more than a press release recording the terms of the settlement under which France agreed to end its "empty chair" policy, record the agreement of the Member States that even where decisions could be taken by a majority vote, where very important interests of a Member State were at stake, the members of the Council would endeavour to reach solutions which could be adopted by all the members of the Council, and a second paragraph added that the French delegation considered that where very important interests were at stake, the discussion must be continued until unanimous agreement was reached. Whatever may be the precise legal status of this agreement to disagree, it was of considerable political importance. It gave rise to what was effectively a convention that policy-making legislation would only be adopted in the Council when a consensus had been achieved; so, for example, it took 17 years to reach agreement on a Directive concerning the activities of architects. However, on one of the few occasions on which the United Kingdom formally invoked the Luxembourg accords, in relation to the 1982 agricultural prices, a vote was still taken and the United Kingdom was out-voted. It may nevertheless be doubted whether all the participants intended simply to override the Luxembourg Accords: it would appear that France (which voted with the majority) took the view that the agricultural prices as such were not "very

"important interests" for the UK, whose real argument was over contributions to the EC budget.

That the use of unanimity, albeit with abstentions, was really a matter of political will, rather than legal obligation, is illustrated by the fact that although until 1986 the number of decisions taken by the Council on a majority basis barely reached double figures in any one year, in 1986, even though the Single European Act was not yet in force, during the first half of the year under the Dutch Presidency, some 43 items of legislation were adopted on a majority basis, and in the second half of the year, under the United Kingdom presidency, no less than 55 legislative acts were adopted on a majority basis. Subsequently, qualified majority voting has become the norm in most areas of Community policy-making (with the notable exception of taxation).

Qualified majorities involve a system of weighted voting, approximately related to the size of the Member State. Under the system in use before the 2004 Accessions, the four biggest Member States, the United Kingdom, France, Germany and Italy, each had 10 votes, whereas at the other end of the scale, Luxembourg had two votes⁴. Until the accession of Spain and Portugal in 1986, the system was designed to ensure that no more than one big Member State could be out-voted, but that the big Member States could not by themselves out-vote the smaller Member States. However, from

⁴ EC Treaty Article 205

1986 onwards, it became possible for two of the large Member States to be out-voted on a qualified majority vote; in other words, France and the United Kingdom, for example, could vote against a proposal and it could still become Community law. This trend continued following the Accession of Sweden, Austria and Finland (though it was still not possible for three big states to be outvoted), and gave rise to UK resistance, which led to the so-called "Ioannina compromise". While in principle following the 1995 accessions a qualified majority required 62 of the total of 87 votes distributed between the Member States, under that political compromise, "if members of the Council representing a total of 23 to 25 votes indicate their intention to oppose the adoption by the Council of a decision by qualified majority, the Council will do all within its power to reach, within a reasonable time and without prejudicing the obligatory time limits laid down by the Treaties and by secondary legislation, such as those in Articles [251] and [252] of the Treaty establishing the European Community, a satisfactory solution that can be adopted by at least 65 votes. During this period, and with full regard for the Rules of Procedure of the Council, the President, with the assistance of the Commission, will undertake any initiatives necessary to facilitate a wider basis of agreement in the Council. The members of the Council will lend him their assistance." This appears to be an attempt (albeit limited in scope) politically to preserve the rights of what would have been a blocking minority before the 1995 Accessions (when a qualified

majority was 54 out of 76 votes). Its status would however appear to have been enhanced by a Declaration to the Final Act introduced by the Treaty of Amsterdam to the effect that "until the entry into force of the first enlargement it is agreed that the decision of the Council of 29 March 1994 ("the Ioannina Compromise") will be reconducted"

Indeed, the Council Secretariat had calculated that if the previous trend in the development of qualified majorities continued unaltered, in a Community of 28 (including East European and Mediterranean countries) a group of States representing less than half of the total population could constitute a qualified majority.

While the problem was recognised but left unresolved at Amsterdam, the solution adopted in the Treaty of Nice and followed in the 2003 Act of Accession involves reweighting in favour of larger Member States (which for these purposes includes Spain, since Spain is a Member State from which two Commissioners used to be appointed) and the imposition of a population requirement. At present under art.205 of the EC Treaty as amended by the 2003 Act of Accession, a qualified majority requires 232 out of 321 weighted votes:

Germany 29
United Kingdom 29
France 29
Italy 29
Spain 27
Poland 27

Netherlands 13
Greece 12
Czech Republic 12
Belgium 12
Hungary 12
Portugal 12
Sweden 10
Austria 10
Slovakia 7
Denmark 7
Finland 7
Ireland 7
Lithuania 7
Latvia 4
Slovenia 4
Estonia 4
Cyprus 4
Luxembourg 4
Malta 3

It may be observed that while the Treaty of Nice and the 2003 Act of Accession may generally be regarded as reinforcing the position of the large Member States, Spain and Poland in particular are favoured by this formula, and, for example, a combination of the Czech Republic, Hungary and Slovakia would have more votes than a large Member State with less than half the population. However, the real change is that under a new art.205(4), the 232 votes must be cast by Member States representing at least 62% of the total population of the EU.

Currently any three of the four biggest Member States have a large enough population to form a blocking minority on the basis of the figures set out in Council Decision 2004/701 amending the Council's Rules of Procedure (OJ 2004 L319/15), so it remains the case that two of the biggest Member States may be outvoted, but

not three of them. On the figures in the decision, the threshold for a qualified majority is 284,331,400 out of a total population of 458,599,000, making the blocking minority any figure higher than 174,267,600. The aggregate populations of any three of the four biggest member States easily surpass this, ranging from 179,224,400 (France, UK and Italy) to 203,867,900 (Germany, France and UK).

However, it is here that the Constitutional Treaty would make a major difference: with effect from 1 November 2009, under the Constitutional Treaty art.I-25(1), a qualified majority would require the votes of 55% of the members of Council (so that Malta's vote would count as much as Germany's), comprising at least 15 members representing 65% of the EU's population. At first sight this population requirement might seem to raise the threshold for a qualified majority, but the second sub-paragraph of art.I-25(1) would introduce a requirement that a blocking minority must include at least 4 Council members; otherwise a qualified majority will be deemed to have been obtained. Again, any three of the four biggest Member States would have a large enough population to form a blocking minority, but they would need a fourth State, even Malta or Luxembourg, to vote with them to prevent a qualified majority being attained. It will therefore at last be possible for any three of the biggest four Member States to be outvoted. On the other hand, where the Council does not act on the basis of a

proposal from the Commission or from the Union Minister of Foreign Affairs, a qualified majority would, under art.I-25(2), have to comprise at least 72% of the members of the Council, though the population requirements would remain the same.

A similar pattern would be followed in areas in which not all member states participate: in the context of enhanced cooperation (art.I-44) and Economic and Monetary Union (art.II-194 etc.), a qualified majority would be the votes of 55% of the participant Member States, comprising at least 65% of their combined population, and a blocking minority would be the minimum number representing more than 35% of the population of the participating States, plus one member. This represents a change from the previous pattern, particularly in the area of Economic and Monetary Union: while the current qualified majority represents about 72% of the weighted votes, in those areas where it was anticipated under the Maastricht Treaty that Community activity might involve less than all the Members of the Community, notably under the Social Protocol⁵ and eventually under the third stage of Economic and Monetary Union⁶, a qualified majority was reduced to two-thirds of the available votes. This model was not followed in the Treaty of Amsterdam: in the Title on free movement of persons, asylum and immigration, in which the United Kingdom, Ireland and

⁵ Art.2

⁶ EC Treaty art.122(5)

Denmark do not in principle participate, a qualified majority is defined as "the same proportion of the weighted votes of the members of the Council concerned as laid down in Article 205(2)", and the same formula is used in the provisions on Closer Cooperation and Flexibility. However, the Amsterdam Treaty did not amend the EMU provisions introduced at Maastricht, nor did the Nice Treaty, so that for the 12 participants in EMU a qualified majority remains two-thirds of the available votes. The question then arises as to whether this would be with or without the population requirement, a matter not envisaged in the texts. This depends on whether art.122(5) should be construed as a derogation from the whole of art.205 or simply as a derogation from the voting figures in art.205. From its wording, it may be suggested that art.122(5) appears to be a derogation from art.205 as such, so it is at least arguable that the current population requirement would not apply in this context. The entry into force of the Constitutional Treaty would clearly remove this anomaly.

However, after the entry into force of the new voting rules in 2009, and at least until 2014, a modified form of the "Ioannina compromise" would continue under the draft decision relating to the implementation of art.I-25 of the Constitutional Treaty, which provides that if members of the Council, representing at least three quarters of the population or at least three quarters of the number of Member States necessary to constitute a blocking minority

resulting from the application of Article I-25(1), first subparagraph, or Article I-25(2), indicate their opposition to the Council adopting an act by a qualified majority, “the Council shall discuss the issue.” In the course of these discussions, the Council is do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address concerns raised by the those members, and the President of the Council, with the assistance of the Commission, would be empowered “to undertake any initiative necessary to facilitate a wider basis of agreement in the Council”.

Finally, it may be observed that art.IV-444 of the Constitutional Treaty would introduce a general power for the European Council to adopt a decision allowing the Council to move from unanimity where it would still be required in a specific area (e.g. under art.II-171 in relation to tax harmonisation) to qualified majority voting in that area, without amending the Treaty. The procedure would however effectively give national Parliaments a veto over such changes.

Indirect Representation of Member States

- Commission**

1While, under art.213 of the EC Treaty, the members of the Commission must neither seek nor take instructions from any government or from any other body, only nationals of Member

States may be members of the Commission, and under the text in force until just after the 2004 Accessions, the Commission had to include at least one national of each of the Member States, but could not include more than two members having the nationality of the same State. Following the 1995 Accessions, there were 20 Commissioners, two from each of the big countries (which for this purpose included Spain) and one from each of the other Member States, though the second paragraph of art.213 provided that the number of members of the Commission could be altered by the Council, acting unanimously. One of the matters long discussed in political circles was whether the number of Commissioners should be reduced to one per State, and there had been ideas floated of grouping some of the smaller countries together to have a rotating Commissioner between them, which essentially is the system used for selecting Advocates-General before the Court (other than those who come from the four biggest countries). This debate puts clearly into focus the question whether the Commission should be regarded as a representative body or simply in terms of its operational needs.

The Treaty of Amsterdam did not directly respond to any of these proposals, but its Protocol on the institutions with the prospect of enlargement of the European Union linked the size of the Commission to the weighting of votes in the Council. Under this Protocol, at the date of entry into force of the first enlargement of

the Union the Commission was to comprise one national of each of the Member States, provided that, by that date, the weighting of the votes in the Council had been modified, in a manner acceptable to all Member States, notably compensating those Member States which gave up the possibility of nominating a second member of the Commission. 1 Here, therefore, the Commission was clearly treated as part of the representative equation and not as a body whose composition was determined according to its operational needs.

This was reflected in the Nice Protocol on Enlargement, and the 2003 Act of Accession, art.45(2)(c) of which provided that from November 2004 (the same date as the change in voting weights in the Council) a new Commission comprising one national of each of the Member States should take up its duties. 1 However, it was further provided in the Protocol that when the Union consists of 27 Member States, Article 213(1) of the EC Treaty should be revised again and that the number of Members of the Commission should be less than the number of Member States. The constitutional Treaty is more specific on this matter. Under the Constitutional Treaty (art.I-26(6)), the first Commission after its entry into force would comprise one member from each State (including the EU Minister for Foreign Affairs), continuing the current situation, and subsequent Commissions would then have members (including its President and the Union Minister for Foreign Affairs)

corresponding to two-thirds of the number of Member States, "unless the European Council, acting unanimously, decides to alter this figure". They would be selected on a basis of "equal rotation" between Member States under a system to be established unanimously by the European Council on the basis of the following principles:

(a) Member States are to be treated on a strictly equal footing as regards determination of the sequence of, and the time spent by, their nationals as Members of the Commission, so that the difference between the total number of terms of office held by nationals of any given pair of Member States may never be more than one;

(b) subject to point (a), each successive Commission shall be so composed as to reflect satisfactorily the demographic and geographical range of all the Member States of the Union.

This may be contrasted with the solution adopted already in the context of the European Central Bank. Its Executive Board has and would continue under the Constitutional Treaty to have only six Members, who would be appointed by the European Council by qualified majority. All the governors of participating national central banks sit on its Governing Council, but under Council Decision 2003/223 (OJ 2003 L83/66), whose effect is continued by

the Protocol on the Statute of the Bank annexed to the Constitutional Treaty, complex voting procedures are triggered when the number of governors exceeds 15 and when it exceeds 22. The governors are to be divided into groups according to defined financial criteria, and voting rights (totalling only 15, but weighted towards the group with the highest financial ranking) are to be allocated to those groups, with those within each group having their votes for equal amounts of time. As reproduced in the

Protocol attached to the Constitutional Treaty:

“1. In accordance with Article III-382(1) of the Constitution, the Governing Council shall comprise the members of the Executive Board of the European Central Bank and the Governors of the national central banks of the Member States without a derogation as referred to in Article III-197 of the Constitution.

2. Each member of the Governing Council shall have one vote. As from the date on which the number of members of the Governing Council exceeds 21, each member of the Executive Board shall have one vote and the number of governors with a voting right shall be 15. The latter voting rights shall be assigned and shall rotate as follows:

(a) as from the date on which the number of governors exceeds 15 and until it reaches 22, the governors shall be allocated to two groups, according to a ranking of the size of the share of their national central bank's Member State in the aggregate gross domestic product at market prices and in the total aggregated balance sheet of the monetary financial institutions of the Member States whose currency is the euro. The shares in the aggregate gross domestic product at market prices and in the total aggregated balance sheet of the monetary financial institutions shall be assigned weights of 5/6 and 1/6, respectively. The first group shall be composed of five governors and the second group of the remaining governors. The frequency of voting rights of the governors allocated to the first group shall not be lower than the frequency of voting rights of those

of the second group. Subject to the previous sentence, the first group shall be assigned four voting rights and the second group eleven voting rights;

- (b) as from the date on which the number of governors reaches 22, the governors shall be allocated to three groups according to a ranking based on the criteria laid down in (a). The first group shall be composed of five governors and shall be assigned four voting rights. The second group shall be composed of half of the total number of governors, with any fraction rounded up to the nearest integer, and shall be assigned eight voting rights. The third group shall be composed of the remaining governors and shall be assigned three voting rights;
- (c) within each group, the governors shall have their voting rights for equal amounts of time;.....
- (f) the Governing Council, acting by a two-thirds majority of all its members, with and without a voting right, shall take all measures necessary for the implementation of the principles laid down in this subparagraph and may decide to postpone the start of the rotation system until the date on which the number of governors exceeds 18."

While this preserves the representative nature of the Governing Council, but at the price of limiting voting rights, it may be suggested that the Executive Board, with its limited but fully participatory membership, offers a better analogy for the future development of the Commission.

Direct and Indirect Representation of Citizens

- **European Parliament**

Since 1979, the European Parliament has been elected directly by the citizens of the Community, albeit not by uniform methods. The seats are nevertheless allocated to each Member State in a way

which is not directly proportionate to population but which gives the bigger Member States more seats than the smaller ones. Until German reunification, the range went from 6 seats for Luxembourg to 81 each for Germany, France, the UK and Italy. However, following the reunification of Germany, it was agreed to recognise the demographic consequences at least to some extent: the number of seats for Germany was raised to 99 (an increase of 18 seats), but the seats for the other three big states were raised by six each to 87, making a total of 18 additional seats between those States. The consequence overall therefore was to increase the relative representation of the big Member States as compared to the smaller ones, but also to ensure that the increase for Germany was balanced by an increase for the other big States, thus showing that the balancing of political weight was as important as (if not more important than) the representation of additional population. Be that as it may, this did suggest that a possible way forward with regard to new small states would be not to eliminate their representation but to increase the representation of the bigger Member States.

The Treaty of Amsterdam did not in itself change the composition of the European Parliament, but it set a limit on its future expansion, by amending art.189 of the EC Treaty to provide that "the number of Members of the European Parliament shall not exceed seven hundred." This limit has however proved to be very short-lived. The Treaty of Nice amended art.189 again to raise the

limit to 732, which could be exceeded on a transitional basis following new accessions under art.2 of the Protocol on Enlargement, and the Constitutional Treaty would raise it again to 750.

By virtue of art.11 of the 2003 Act of Accession, the provisions relating to the European Parliament take effect from the start of the 2004–2009 term, so that the Parliament elected in the summer of 2004 took part in the appointment of the first Commission governed by the new rules, which took office on 22 November 2004, later than the planned date of 1 November 2004 owing to the Parliament's success in obtaining changes to the list of nominees put forward by the Council. It is provided in art.11 of the 2003 Act of Accession that the number of representatives elected in each Member State is as follows:

Germany 99
United Kingdom 78
France 78
Italy 78
Spain 54
Poland 54
Netherlands 27
Greece 24
Czech Republic 24
Belgium 24
Hungary 24
Portugal 24
Sweden 19
Austria 18
Slovakia 14
Denmark 14
Finland 14
Ireland 13

Lithuania 13

Latvia 9

Slovenia 7

Estonia 6

Cyprus 6

Luxembourg 6

Malta 5

The practical result is that there has been a reduction of representation for most pre-2004 Member States except Germany and Luxembourg. Currently Malta has only 5 MEPs under art.11 of the Act of Accession 2003, the smallest number of any Member State – less even than Luxembourg. However, under the Constitutional Treaty, it is stated as a general principle that representation is to be “degressively proportional” with a minimum of six members per Member State (art.I-20(2)) and no more than 96 from one Member State (total up to 750). This would increase the number of MEPs from Malta, and illustrates clearly that while big States have more MEPs than small ones, small ones are proportionately better represented, so as to allow for an effective political choice in even the smallest Member State.

It may also be observed in the context of the Parliament that a revised form of codecision would become the “ordinary legislative procedure” under art.I-34(1) and art.III-396. The essential feature of codecision is that it requires the Council and the Parliament to reach agreement in order to adopt the measures at issue, and that neither institution can override the rejection of a proposal by the other.

- **National Parliaments**

In many respects the Constitutional Treaty provides greater opportunities for national parliaments to play an active role in the EU context. They are given a formalized role in the context of subsidiarity under art.I-11(3), which empowers national parliaments to ensure compliance with the principle of subsidiarity in accordance with the procedure set out in the revised text of the Protocol on Subsidiarity and Proportionality. The Constitutional Treaty amends this Protocol, which was originally introduced by the Treaty of Amsterdam, so as to require the Commission to forward its draft European legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator. It also requires the European Parliament to forward its draft European legislative acts and its amended drafts to national Parliaments, and it states that the Council must forward draft European legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank (and amended drafts) to national Parliaments. Furthermore, upon adoption, legislative resolutions of the European Parliament and positions of the Council must be forwarded by them to national Parliaments. It will however be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.

Under art.6 of the Protocol, any national Parliament or any chamber of a national Parliament may, within six weeks from the date of transmission of a draft European legislative act, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It would be for the President of the Council, if the draft European legislative act originates from a group of Member States, or another EU institution or body, to forward the opinion to the governments of those Member States or to the EU institution or body concerned. The European Parliament, the Council and the Commission, and, where appropriate, the group of Member States, or other EU institutions and bodies if the draft legislative act originates from them, are then required “take account” of the reasoned opinions issued by national Parliaments or by a chamber of a national Parliament.

It is further provided in art.7 that where reasoned opinions on a draft European legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments, “the draft must be reviewed”. In calculating such a vote, each national Parliament would have two votes, shared out on the basis of the national Parliamentary system.

In the case of a bicameral Parliamentary system, each of the two chambers would have one vote.

This threshold would be reduced to a quarter of the allocated votes in the case of a draft European legislative act submitted on the basis of art. III-264 of the Constitutional Treaty on the area of freedom, security and justice. After carrying out such a review, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft European legislative act originates from them, may decide to maintain, amend or withdraw the draft, but reasons must be given for this decision.

National Parliaments are also given a right of action before the European Court. Art.8 declares that the Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in art.III-365 of the Constitutional Treaty (which governs actions for annulment) by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it. Similarly, the Committee of the Regions would also be empowered to bring such actions against European legislative acts for the adoption of which the Constitution provides that it be consulted.

The national parliaments are also expressly involved in the “flexibility clause” (art.I-18), which makes a procedure similar to the current art.308 of the EC Treaty available for the EU as a whole. It provides that if action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set by the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, may adopt the appropriate measures. However, art.I-18(2) then adds that using the procedure for monitoring the subsidiarity principle referred to in art.I-11(3), the Commission must draw Member States' national Parliaments' attention to proposals based on this provision.

A stronger role is given to national parliaments in the context of what is termed “the simplified revision procedure” under art.IV-444 of the Constitutional Treaty. As noted earlier in this paper, this would introduce a general power for the European Council to adopt a decision allowing the Council to move from acting by unanimity where it would still be required in a specific area (e.g. under art.II-171 in relation to tax harmonisation) to qualified majority voting in that area, without amending the Treaty. However, under art.IV-444(3), any initiative taken by the European Council on the this

basis must be notified to the national Parliaments of the Member States, and if a national Parliament made known its opposition within six months of the date of such notification, the European decision could not be adopted. It would only be in the absence of opposition that the European Council could adopt the decision. It may be observed that in this context no distinction is made between the parliament of e.g. Germany and the parliament of e.g. Malta or Luxembourg.

Similarly, the Protocol on the Role of National Parliaments, originally annexed to the Treaty of Amsterdam, has been considerably reinforced. In the version adopted with the Constitutional Treaty, not only must Commission consultation documents (green and white papers and communications) be forwarded directly by the Commission to national Parliaments upon publication, but the Commission must also forward the annual legislative programme as well as any other instrument of legislative planning or policy to national Parliaments, at the same time as to the European Parliament and the Council. It would also be required that draft European legislative acts sent to the European Parliament and to the Council must be forwarded to national Parliaments; ‘draft European legislative acts’ are defined as proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank

and requests from the European Investment Bank for the adoption of a European legislative act. More specifically, it is required that draft European legislative acts originating from the Commission must be forwarded to national Parliaments directly by the Commission, at the same time as to the European Parliament and the Council.

Draft European legislative acts originating from the European Parliament are to be forwarded to national Parliaments directly by the European Parliament, and draft European legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank are to be forwarded to national Parliaments by the Council.

Art.3 of the Protocol then provides that National Parliaments may send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion on whether a draft European legislative act complies with the principle of subsidiarity, in accordance with the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality mentioned above. If the draft European legislative act originated from a group of Member States, the President of the Council would have to forward the reasoned opinion or opinions to the governments of those Member States, and if it originated from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council would have to

forward the reasoned opinion or opinions to the institution or body concerned.

Effectively following the original text, art.4 would require that a six week period should elapse between a draft European legislative act being made available to national Parliaments in the official languages of the Union and the date when it is placed on a provisional agenda for the Council for its adoption or for adoption of a position under a legislative procedure. Exceptions would however be possible in cases of urgency, the reasons for which would have to be stated in the act or position of the Council. The Protocol would expressly lay down that save in urgent cases for which due reasons have been given, no agreement may be reached on a draft European legislative act during those six weeks.

Furthermore, save in urgent cases for which due reasons have been given, a ten day period would have to elapse between the placing of a draft European legislative act on the provisional agenda for the Council and the adoption of a position. Under art.5, the agendas for and the outcome of meetings of the Council, including the minutes of meetings where the Council was deliberating on draft European legislative acts, would have to be forwarded directly to national Parliaments, at the same time as to Member States' governments. There is however a direct link to the simplified revision procedure in art.6 of the Protocol, which provides that when the European Council intends to make use of

Article IV-444(1) or (2) of the Constitution, national Parliaments must be informed of the initiative of the European Council at least six months before any European decision is adopted.

Finally, arts.9 and 10 of the Protocol take inter-Parliamentary cooperation beyond the previous version. It is provided that the European Parliament and national Parliaments shall together determine the organisation and promotion of effective and regular interparliamentary cooperation within the Union. Furthermore, what is renamed a “Conference of Parliamentary Committees for Union Affairs” may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission. That conference may in addition promote the exchange of information and best practice between national Parliaments and the European Parliament, including their special committees. It may also organize interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defence policy. However, contributions from the conference would not bind national Parliaments and would not prejudge their positions.

Conclusion

While many of these changes might appear to involve matters of technical detail, it may be suggested that far from introducing a federal superstate, the institutional changes which would result

from the entry into force of the Constitutional Treaty tend to realign the balance in favour of national parliaments and small states, while beginning to take account of operational requirements in the context of non-representative bodies such as the Commission.